

OFFICE OF CONGRESSIONAL AFFAIRS

Routing Slip

	ACTION	INFO
1. D/OCA		<i>x</i>
2. DD/Legislation	<i>xxxx</i>	
3. DD/Senate Affairs		<i>x</i>
4. Ch/Senate Affairs		
5. DD/House Affairs		<i>x</i>
6. Ch/House Affairs		
7. Admin Officer		
8. FOIA Officer		
9. Constituent Inquiries Officer		
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SUSPENSE

9Aug89

Date

Action Officer:

Remarks:

Completed by

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Name/Date

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SUSPENSE

11/17/80

Date

Action Officer:

Remarks:

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Name/Date

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 26, 1989

OCA 2647-89

LEGISLATIVE REFERRAL MEMORANDUM

7 pages
total

TO: Department of Defense - Sam Brick (697-1305)
Department of State - Bronwyn Bachrach (647-4463)
National Security Council - G. Philip Hughes (456-2224)
Central Intelligence Agency - E. Norbert Garrett
Department of Transportation - Tom Herlihy (366-4687)
Department of the Treasury - Carole Toth (566-8523)

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OCA FILE

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SUBJECT: Department of Justice proposed report on H.R. 1333 --
To amend the Foreign Agents Registration Act of 1938."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with Circular A-19.

Please provide us with your views no later than August 9, 1989.

Direct your questions to Gregory Jones (395-3454), of this office.

James J. Jones
James J. Jones for
Assistant Director for
Legislative Reference

Enclosures

cc: Mike Sloan
Bruce Sasser
Bob Damus
Bob Howard
Sue Thau/Annette Rooney



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Jack Brooks
Chairman, Committee on the Judiciary
House of Representatives
Washington, D.C. 20515-6216

Dear Mr. Chairman:

Thank you for giving us the opportunity to comment on H.R. 1333, a bill "to amend the Foreign Agents Registration Act of 1938 to strengthen the registration and enforcement requirements of that Act."

The bill would amend the definition of "agent of a foreign principal" to specifically define "control" of the agent by the principal; would eliminate the current random reporting dates of agents and require all agents to report on the six-month periods ending on June 30 and December 31; would eliminate the so-called "attorney's exemption" from registration and disclosure; would allow the Attorney General to assess civil penalties against persons determined, after notice and opportunity for an administrative hearing, to have committed certain registration or disclosure violations; and would allow administrative law judges to issue subpoenas, enforceable by application to the United States District Court, to require attendance of witnesses and production of evidence in investigations and hearings to determine civil violations.

The Department supports efforts to clarify and strengthen the registration and enforcement requirements of the Act, and in particular to clarify the circumstances in which a foreign principal's ownership of an agent should necessitate registration. However, the Department believes that this can be accomplished more effectively by amending the Act to define the term "predominantly a foreign interest" in Section 3(d)(2) in the way the bill would define the term "control".

The Department also supports eliminating the current random reporting date system, and requiring all agents to report

- 2 -

semiannually, on a calendar year basis, provided that registrants with a different fiscal year are allowed, like taxpayers, to petition for a change in reporting dates. While this may cause some administrative difficulties for the Department and registrants initially, the benefits to the Congress, the public, and ultimately the registrants and the Department outweigh these costs.

The Department would oppose eliminating the so-called attorneys' exemption entirely, but would support limiting that exemption to attorneys who appear in court or on the record in formal administrative or non-legislative Congressional hearings, and eliminating it for attorneys whose contact with these agencies or officials is ex parte, or in informal established agency proceedings.

The Department supports the addition of civil fines as an enforcement tool, and suggests that late filing of documents by agents be similarly penalized. It is suggested that the civil fines be made part of the existing civil remedy in Section 8(f) of the Act, heard in District Court, and not a new administrative legal process.

The Department also supports the addition of subpoena authority to the Act, and suggests that rather than drafting a new provision on this subject, the Congress allow the Attorney General to issue Civil Investigative Demands in Foreign Agents cases, as currently authorized in antitrust, organized crime, and false claim act cases. The Department has drafted appropriate alternate language to achieve that result. Detailed comment on the above aspects of H.R. 1333 follows.

The bill would amend the definition of "agent of a foreign principal" in Section 1(c)(1) of the Act to define what is meant by the term "control". The bill provides that:

"a foreign principal shall be considered to control a person in major part if the foreign principal holds more than 50 percent equitable interest in such person or, subject to rebuttal evidence, if the foreign principal holds at least 20 percent but not more than 50 percent equitable ownership in such person".

The purpose of the amendment, as we understand it, is to provide more concrete guidelines for determining when the United States component of a multinational corporation is required to register. See, e.g., the statement of Senator Heinz upon the introduction of the companion bill, S. 176:

"One of the phenomena I noticed during debate over the trade bill is the growing blurring of the line between us and them as U.S. companies are increasingly owned by foreign corporations, and U.S. corporations increasingly recalculate their public policy positions based on their assessment of their interests overseas."

While the Department agrees with that goal, we question whether defining the term "control" is the best way to approach the problem. Currently, for example, Rule 100(b) under the Act, 28 C.F.R. 5.100(b), defines "control":

"...to include the possession or the exercise of the power, directly or indirectly, to determine the policies or the activities of a person, whether through the ownership of voting rights, by contract, or otherwise".

This definition, which is more flexible than the amendment proposed, has been found sufficient in our experience to establish the relationship of agent and principal under the Act. It has not been sufficient, however, to resolve the ambiguities inherent in the political activities of multinational corporations, for the reasons stated below.

Prior to the 1966 amendments to the Act, any person in the United States with an agency relationship with a foreign principal who engaged in political activities was required to register under the Act. With the 1966 amendments, such a person is required to register only if such activities are "for or in the interests of such foreign principal". Furthermore, since representatives of multinational corporations pointed out in 1966 that it would be difficult to determine in a particular instance whether their political activities were in the interests of the parent or the subsidiary, Sections 3(d)(2) and 1(q) were added to the Act. Section 3(d)(2) exempts "other (including political) activities not serving predominantly a foreign interest", and Section 1(q) defines what that means for multinational corporations engaged in substantial commercial, industrial or financial operations in the United States. In essence, that section provides that absent ownership or control of the parent, or direction or control of the political activities, by a foreign government or foreign political party, as long as the political activities are in furtherance of the bona fide interests of the domestic person, the activities are exempt if the identity of the foreign parent is disclosed to the agency or official with whom the political activities are conducted. But, as Senator Heinz noted in the statement quoted above, the change in ownership has led to a recalculation of the interests of the domestic person. The result is that the Act no longer reflects the full range of foreign influences on the American political decision-making process.

As foreign ownership of American corporations has increased, registration of these agents has not been required under the Act for the reasons stated. However, if Section 1(q) of the Act were amended to define the term "predominantly a foreign interest" in the way the bill defines the term "control", it would require the registration of more American subsidiaries of foreign parents. The amendment could be inserted as an exception to the general result of nonregistration in that Section by introducing the operative language of the bill after the word "person" and before the word "Provided". The amendment would read:

"...unless the foreign person holds more than 50 percent equitable ownership in such domestic person or, subject to rebuttal evidence, if the foreign person holds at least 20 percent but not more than 50 percent equitable ownership in such domestic person."

The Department supports Section (b) of the bill, which would eliminate the current random reporting date system, and require all agents to file their supplemental statements semiannually on July 31 and January 31, with one modification. It has been our experience that if registrants could choose their own reporting dates, the vast majority would choose those in the bill. We anticipate that allowing them to so report will improve the timeliness of their reporting. In order to achieve the most timely compliance, the Department suggests that agents with a fiscal year different than the calendar year be allowed to petition for reporting dates that allow them to comply more easily with the Act. This is the current law with respect to tax returns.

The Department opposes eliminating the exemption in Section 3(g) of the Act entirely, but would welcome an amendment to that section to clarify the intent to restrict it to attorneys who give legal advice, appear in court, or appear on the record in formal administrative proceedings, or non-legislative Congressional hearings. The exemption would not cover attorneys who appear before Congress on legislative matters generally, lobby the Executive or Legislative branches, or argue their client's case to the public.

Senator Heinz, in his comments in the Congressional Record of January 25, 1989, indicated that he thought that the Act should be amended so that attorneys representing foreign principals in formal trade proceedings, including antidumping and countervailing duty investigations, and Section 301, 201, and 337 cases, should be required to register. Currently, such attorneys are required to register only if they engage in attempts to influence the agency outside the course of its established agency proceedings, obtain the involvement of other agencies or officials as their advocates, or attack or defend the agency decision politically. Although there would be some additional

- 5 -

benefit in requiring earlier registrations in trade cases that ultimately are decided politically, it is probably unwise to specifically include them statutorily, and eliminating the exemption entirely has the unintended result of requiring registration in cases challenging the validity of the law. Since under the current law it has been particularly difficult to determine which attempts by attorneys to influence policy are outside informal agency proceedings, it is suggested that the exemption be limited to court proceedings and formal, on-the-record, agency proceedings - that is, that the section be amended to add the word "formal" before "established agency proceedings", and end the exemption with that phrase, dropping the phrase "whether formal or informal".

Section (d) of the bill establishes civil penalties for persons who fail to file registration statements or supplemental statements, omit a material fact required therein, or make a false statement with respect to a material fact. The Department welcomes these additional enforcement tools, and suggests that a civil penalty also be provided for persons who file registration or supplemental statements late. That can be accomplished by adding the phrase "as and when such filing is required" at the end of Section (d)(1)(A) of the bill. The Department also suggests that the civil penalty be enforced in the United States District Court for the District of Columbia, rather than in a separate administrative proceeding in which the Department is both prosecutor and sentencing judge.

Section (d)(2)(A) of the bill provides that administrative law judges may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place of hearing, and Section (d)(2)(B) provides that such subpoenas are enforceable upon application of the Attorney General to an appropriate United States District Court. The Department would prefer having administrative subpoena power not only for civil fine cases, but also to augment its inspection authority under Section 5 of the Act and to complete all its investigations in the quickest and most efficient manner possible. For this reason the Department requests that we be authorized to issue Civil Investigative Demands (CID) in Foreign Agents cases, as is now authorized by the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 1312-1314; the 1986 False Claims Amendments Act, 31 U.S.C. § 3733; and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1968. Currently, the only method to obtain documents and oral or written testimony from unwilling persons is to have a grand jury subpoena issued, which is often inappropriate. The Department has drafted a CID provision for foreign agents cases based on the CID provisions listed.

We look forward to working with you and your staff to improve and implement this legislation.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Carol T. Crawford
Assistant Attorney General